STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	FOR PUBLICATION August 26, 2010
v	No. 286834 Wayne Circuit Court
TION TERRELL, Defendant-Appellee.	LC No. 08-001533-02 Advance Sheets Version

Before: METER, P.J., and BORRELLO and SHAPIRO, JJ.

SHAPIRO, J. (*concurring*).

I concur in the result in this case because I do not believe that defendant provided an adequate basis for the trial court to grant his motion for a new trial pursuant to MCR 6.431(B), whether we apply the test employed by the majority of federal circuits or the test enunciated by the United States Court of Appeals for the First Circuit. Therefore, I do not believe we need to reach the question of which test to apply. However, the majority having reached it, I respectfully suggest that the more appropriate test is that enunciated by the First Circuit.

In *United States v Montilla-Rivera*, 115 F3d 1060, 1066 (CA 1, 1997), the First Circuit held that "the better rule is not to categorically exclude the testimony of a codefendant who asserted his Fifth Amendment privilege at trial under the first prong but to consider it, albeit with great skepticism . . . ." The court recognized that "[i]t is true that there is a greater need for caution in considering [such] motions where the new evidence comes from a codefendant who was 'unavailable' at trial because he chose to exercise his privilege." *Id.* Indeed, the First Circuit did not order a new trial, but merely directed that the trial court hold a hearing to hear the "new" evidence, and further noted that even having such a hearing is "[not] required in the usual course."[1] *Id.* at 1067. The First Circuit's approach would not open the floodgates for new trials

[1] In *Montilla-Rivera*, the court reversed the trial court's denial of a motion for a new trial, but only after a careful review of the facts and circumstances of the case. *Montilla-Rivera*, 115 F3d at 1067-1068. First, the court noted that although the evidence against the defendant was sufficient, "[t]he evidence [was] thin . . . ." *Id.* at 1064. Second, the court noted that the defendant had "diligently attempted to secure [the codefendants'] testimony . . . ." *Id.* at 1065. The defendant's attorney tried on two separate occasions to interview the codefendants, but they

on the basis of "newly available" codefendant testimony. Rather, it would take the prudent and limited step of not foreclosing the possibility that justice may require the granting of a new trial in a particular case involving newly available evidence.

In this case, defendant is not entitled to a new trial under the First Circuit's test. First, there was other evidence admitted that showed the victim was armed. Thus, defendant was able to present evidence in support of his self-defense claim. Second, defense counsel did not interview or attempt to interview the codefendant, thus undercutting the likelihood that there was a good-faith belief that he could offer exculpatory testimony. Third, there was no request for severance or for the codefendant's trial to occur first, a mechanism that might have avoided the Fifth Amendment problem. Fourth, there was no attempt to call the codefendant at trial and to require him to assert his Fifth Amendment privilege outside the presence of the jury. Fifth, there was no offer of proof at trial about what defendant believed his codefendant could testify to if he did not assert his Fifth Amendment privilege. These failures strongly suggest that the issue in this case related more to the desirability of an appellate parachute rather than the existence of known exculpatory testimony that was genuinely unavailable before defendant's conviction.

I agree with the majority that postconviction claims of exculpatory testimony from a codefendant should be viewed with a high degree of suspicion. However, that is a matter best addressed on a case-by-case basis and not with a bright-line rule. I also recognize that the majority does not view the rule it adopts today as foreclosing a case-by-case approach. Indeed, the majority makes this clear by positing that "[t]here may be cases in which [a codefendant's posttrial or postconviction exculpatory statement] does indeed constitute newly discovered evidence." I believe the majority and I are in agreement that a trial court should not be precluded from granting a new trial when the defendant made appropriate efforts to obtain the testimony at trial and the trial court, in an exercise of sound discretion after hearing all the evidence, concluded that a miscarriage of justice may have occurred. I am concerned, however, that this critical exception to the rule otherwise excluding newly available evidence might be lost in subsequent cases. I believe that in order to assure that it is not, the more prudent course would be to adopt the First Circuit's standard, which more explicitly provides for the exception.

/s/ Douglas B. Shapiro

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refused to speak with him. *Id.* at 1065 n 3. He also moved to have the two codefendants subpoenaed to testify, and his client had "insisted that the testimony would exculpate him rather than hurt him." *Id.* At the defendant's trial, the codefendants informed the court that they would not testify despite the defendant's request, and the court noted that each of the codefendants' attorneys had advised his client not to testify because the testimony might be incriminating with regard to other transactions and because the codefendants were still awaiting sentencing. *Id.* at 1065. Finally, the court noted that the new testimony was neither cumulative nor implausible. *Id.* at 1066.